

ADMINISTRATIVE POLICY



STATE OF WASHINGTON DEPARTMENT OF LABOR AND INDUSTRIES EMPLOYMENT STANDARDS

TITLE:	RETAIL OR SERVICE ESTABLISHMENT COMMISSION OVERTIME EXCEPTION	NUMBER:	ES.A.10.1
		REPLACES:	N/A
CHAPTER:	RCW 49.46.130(3)	ISSUED:	1/2/2002

The 1997 Legislature amended RCW 49.46.130, the state overtime statute, to provide an exception to the payment of overtime for hours in excess of 40 in a week to certain commissioned employees of retail sales or service establishments.

Because RCW 49.46.130 (3) (a) and (b) sets forth language identical to that contained in the federal Fair Labor Standards Act at 29 USC § 207 (i), and because the purpose of the legislative amendment was to achieve conformity with federal law governing exemptions to overtime for certain employees of retail or service establishments, the Department of Labor and Industries hereby adopts federal Department of Labor definitions and interpretations of FLSA provisions which are identical to RCW 49.46.130(3)(a) and (b). The federal sources noted in this administrative guideline should be consulted for additional information regarding interpretation and enforcement.

How to determine who is covered by the retail and service establishment overtime exception. To determine if an employee is covered by RCW 49.46.130 (3)(a) and (b), the employer must show:

1. The worker is an employee of a “retail or service establishment;” and
2. The employee’s regular rate of pay is in excess one and one-half times the minimum hourly rate required by RCW 49.46.020 for every hour worked in a workweek in which overtime hours are worked; and,
3. More than half of the employee’s compensation for a representative period, of not less than one month, represents commissions on goods or services.

Unless all three conditions are met, the exception is not applicable, and overtime premium pay of at least time and one-half the regular hourly wage must be paid for all hours worked over 40 in a workweek.

Definition of “retail or service establishment.” Retail and service establishments are defined as establishments where 75 percent of the annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry. In addition, more than 50 percent of the establishment’s dollar volume of sales of goods or services must be within the state in which the establishment is located.

Some examples of establishments which may be retail sales or service are: automobile repair shops, bowling alleys, gasoline stations, appliance service and repair shops, department stores and restaurants. Some examples of establishments that are not retail are: accounting firms, medical and dental clinics, construction companies, radio and television stations. **See ES.A.10.2** for a detailed list of retail and service establishments.

Laundry and similar establishments are excluded from the exemption. The exemption does not apply to any employee of an establishment which derives more than 25 percent of its annual dollar volume from laundering, cleaning, or repairing clothing or fabrics, including rug and carpet cleaning, or other non-retail activities.

Employers must select a representative period. The representative period for determining if enough commissions have been paid may be as short as one month but must not be greater than one year. An employer must select a representative period or risk losing eligibility for the exemption. The exemption under RCW 49.46.130(3) requires the employer to choose a representative period and such period must be designated and substantiated in the employer’s records. Failure to make such a designation may be grounds for denying application of the exemption.

Note: The absence of such a designation is a violation of the federal record keeping requirements under 29 CFR 516.16 (b). The USDOL position is that if a retail or service establishment employer fails to designate the representative period, the exemption from overtime cannot be claimed. See USDOL Interpretive Bulletin 779.415 and 799.417.

Retail and service establishments must maintain accurate records. State regulations require retail and service establishment employers to maintain accurate records of hours worked each workday, hours worked each workweek and earnings and wages paid. Without hours worked and earnings records, the employer will be unable to substantiate that all conditions for the exemption have been met. In addition, the employer must select a representative period of at least one month, but not more than one year, which typifies the characteristics of the employee’s earnings pattern, in order to test whether the employee is paid principally by commissions. See WAC 296-128-010 to 025 and administrative policy ES.D.1 for record keeping requirements that apply to all employees except those exempt under RCW 49.46.010(5). These record

keeping requirements apply to employees of retail or service establishments even if those employees are exempt from overtime under RCW 49.46.130(3)(a) and (b).

Commissions on goods and services must be greater than 50 percent of earnings. If the employee is paid entirely by commissions, or draws and commissions, or if commissions are always greater than salary or hourly amounts paid, the “greater than 50 percent commissions” condition will have been met. If the employee is not paid in this manner, the employer must separately total the employee’s commissions and other compensation paid during the representative period. The total commissions paid must exceed the total of other compensation paid for this condition to be met.

The regular rate of pay must be more than one and one-half times the minimum wage. To determine if an employer has met the “more than one and one-half times the applicable minimum wage” condition, the employer may divide the employee’s total earnings attributed to the pay period by the employee’s total hours worked during such pay period. If the result is greater than one and one-half the statutory minimum wage, this condition of the exemption has been met.

Steps to “test” the validity of the exception by computing the employee’s regular rate:

1. Determine the representative period;
2. Determine the employee’s total commissions for the representative period;
3. Determine the employee’s total pay for the representative period from sources other than commissions, e.g., salary, hourly rate, advances, guarantees, draws;
4. Determine whether or not the commissions exceed the total of other forms of pay. If not, the employer is not eligible for this exception, and the employer must pay time and one-half the regular rate for each hour over 40 per week.
5. If commissions do exceed 50 percent, for each pay period in which more than 40 hours were worked in any work week, divide the total compensation for that pay period by the total hours worked during the pay period to confirm that the employee was paid in excess of time and one-half minimum wage for all hours worked (not just overtime hours). If the rate was more than time and one-half minimum wage for all hours worked, the employee need not be paid any more for the overtime hours in that pay period.

If the regular rate does not exceed one and one one-half the minimum wage for all hours worked, the employee is due time and one-half the regular rate for all hours over 40 per week.

A week-by-week determination of the regular rate for purposes of the RCW 49.46.130(3)(a) is not necessary if the earnings are consistently and obviously higher than required to meet the test. However, situations may be encountered where the test is not clearly met and specific determinations of the regular rate for particular weeks are required.

In determining whether or not the employee's regular rate of pay is in excess of one and one-half times the minimum hourly wage as required by RCW 49.46.130(3)(a), the employer may divide the employee's total earnings attributed to the pay period by the employee's total hours worked during such pay period. Total earnings include commissions, any part of a draw that exceeds commissions, and supplemental payments, if any, that may have been paid to the employee. Supplemental payments are payments that have been made in order to increase the employee's earnings to an amount in excess of one and one-half times the minimum hourly wage.

How to determine a representative period for a group of employees and for new employees. The same representative period for purposes of RCW 49.46.130(3)(b) may be used for a group of employees where it can be demonstrated that the factors affecting the proportionate relationship between total compensation and compensation representing commissions will be substantially identical for all of the employees in the group.

If a new employee becomes part of a group, all of whom clearly meet the test of RCW 49.46.130(3)(b) based on the representative period designated for them, the new employee may, for enforcement purposes, also be treated as meeting the test of RCW 49.46.130(3)(b) from the start of his employment if it can reasonably be expected that, considering the experience and other qualifications of the new employee, there will be no significant difference as to the proportionate relationship between the types of compensation in his situation from that prevailing for the other members of the group.

Similarly, if a new employee is hired to fill a specific job previously occupied by an employee for whom substantial information as to compensation is available, and if it can reasonably be expected that the proportionate compensation for the new employee will not be substantially different from that of the previous employee, the period applicable to the previous employee can be applied to the new employee.

In some situations it may not be reasonable to expect that the proportionate compensation of a new employee will correspond to that of a prior occupant of the position. This may happen, for example, when an inexperienced employee takes over for an experienced more highly compensated employee. In such a case, the department will, for enforcement purposes, permit the employer to determine compliance with RCW 49.46.130(3)(b) on the basis of the new employee's earnings experience (of not less than one month) until the completion of the full representative period applicable to other employees in the group.

Certain types of payments can or cannot be considered commissions for purposes of the exemption.

1. **Service charges collected by the establishment and paid to employees.**
Hotels, motels and restaurants may levy mandatory service charges on

customers, which represent a percentage of amounts charged to customers for services. If part or all of the service charges are paid to service employees, that payment may be considered commission and, if other conditions are met, the service employees may be exempt from the payment of overtime premium pay.

2. **Tips.** Tips paid directly to service employees by customers may never be considered commissions for the purposes of this exemption.
3. **Commissions computed as a percentage of charges for services.** Some retail or service establishments compute an employee's compensation on the basis of percentage of the charge to the customer, such as the charge for labor or the charge for service and parts used in repair. Compensation computed in this matter "represents commissions on goods or services" for the purpose of applying RCW 49.46.130(3)(a)(b). Employees whose compensation (either in whole or in part) is frequently computed in this fashion are barbers, beauty shop operators, household appliance repairman, and automobile mechanics.

Some auto service garages compensate mechanics or painters on the basis of commission, which are based on a percentage of the estimated labor charges to recondition used cars that are subsequently sold. Such payments "represent commission on goods or services" for the purpose of RCW 49.46.130(3)(a)(b). The term "commissions or services" includes commissions measured by value as well as by sale or service and the value of such service is ultimately reflected in the price of the used cars on which work is performed.

Some auto service garages and car dealerships compensate mechanics and painters on a "flat rate" hour for the work he/she performs. A "flat rate" hour is not an actual clock hour. The painter or mechanic may work only 7, 8 or 9 hours a day and still receive credit for 10, 11, 12 or more "flat rate" hours depending upon how much work he/she has done. Each job is assigned a certain number of hours for which the customer is charged regardless of the actual time it takes to perform the job. The employee is given a certain proportion of that charge expressed in terms of so many dollars and cents per "flat rate" hour rather than in terms of a percentage of the charge to the customer. The dealer does not change the employee's share per flat rate hour if the charge to the customer is changed. Such payments are "commissions on goods or services" for purposes of the exemption. Such employment will qualify for exemption under RCW 49.46.130(3) provided all the other tests of the exemption are met.

4. **Commissions paid to department or store managers.** In some cases, a department manager or store manager is paid a commission on all or some of the sales made by his department or store. For purposes of applying the exemption to such a manager, these payments are considered to represent commission on goods or services, even though the other employees actually

made all or most of the sales. The role, position and function of the manager greatly contribute to the sales of his store or department.